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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFREDO RIVERA-PRECIADO,

Defendant - Appellant.

No. 07-50042

D.C. No. CR-06-00789-BEN-1

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted November 13, 2007^{**}

Before: TROTT, W. FLETCHER and CALLAHAN, Circuit Judges.

Alfredo Rivera-Preciado appeals the sentence imposed following his guilty plea to being a deported alien found in the United States in violation of 8 U.S.C. § 1326(a) & (b). Rivera-Preciado contends that, pursuant to the doctrine of

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

avoidance of constitutional doubt, the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is limited to the proposition that the fact of prior conviction need not be charged in the indictment where the defendant admits the prior conviction during a guilty plea, and alternately that *Almendarez-Torres* has effectively been overruled, such that 8 U.S.C. § 1326(b) is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As Rivera-Preciado concedes, these contentions are foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir.2006), cert. denied, 127 S.Ct. 1866 (2007).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir.2000), we remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir.2000) (remanding sua sponte to delete reference to §1326(b))

AFFIRMED and REMANDED.